Missouri Court of Appeals

Southern District

Division Two

RONALD JOE HAYES, et ux.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. SD27730
	)	
TRISHA G. PRICE,	)	Opinion filed:
	)	February 24, 2009
Defendant-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable George Crocker Baldridge, Circuit Judge

AFFIRMED AS MODIFIED

Ronald Hayes (Plaintiff) was seriously injured when his motorcycle struck an automobile driven by Trisha Price (Defendant), who had turned left in front of Plaintiff at an intersection. Thereafter, Plaintiff and his wife brought suit against Defendant. The petition alleged, *inter alia*, that Defendant had failed to yield the right-of-way to Plaintiff and thereby caused personal injuries to him and a loss of consortium to his wife. In Defendant's answer, she alleged that Plaintiff was comparatively at fault, *inter alia*, for failing to keep a careful lookout.

At the conclusion of the trial, the court gave Instruction No. 7 as Plaintiff's verdict-directing instruction. It hypothesized that Defendant had failed to yield the right-

of-way. Over Plaintiff's objection, the court also gave Instruction No. 10. It hypothesized that Plaintiff was comparatively at fault for failing to keep a careful lookout. The jury found Defendant 80% at fault and Plaintiff 20% at fault. Plaintiff's total damages were assessed at $625,000. The jury also found that Plaintiff's wife did not sustain any loss of consortium. The trial court entered judgment in favor of Plaintiff for $500,000 and denied his request for prejudgment interest pursuant to § 408.040.2.[1] Plaintiff appealed and presents two points for decision.

Point I

In Plaintiff's first point, he contends the trial court erred by giving Instruction No. 10 because it was not supported by the evidence. A jury instruction shall be given or refused by the trial court according to the law and the evidence in the case. Rule 70.02(a). Whether Defendant's comparative fault instruction should have been given is a question of law to be determined on the record with little deference to the trial court's decision. ***Thompson v. Brown & Williamson Tobacco Corp.***, 207 S.W.3d 76, 120 (Mo. App. 2006).

"A comparative fault instruction is not warranted in every negligence suit. Rather, the defendant bears the burden of producing evidence to support the instruction." ***Wendt v. General Acc. Ins. Co.***, 895 S.W.2d 210, 215 (Mo. App. 1995). Thus, a comparative fault instruction must be supported by substantial evidence and cannot be based upon mere speculation or conjecture. ***Id***.; ***Benedict v. Northern Pipeline Constr.***, 44 S.W.3d 410, 423 (Mo. App. 2001). It is error to give a comparative fault instruction

[1] All references to statutes are to RSMo (2000). All references to rules are to Missouri Court Rules (2005).

that is not supported by substantial evidence. ***Stevens v. Craft***, 956 S.W.2d 351, 358-59 (Mo. App. 1997); ***McLeod v. Beloate***, 891 S.W.2d 476, 478 (Mo. App. 1994). Reversal is required if the error was prejudicial. ***Blackwell v. Simmons***, 202 S.W.3d 715, 716 (Mo. App. 2006).

On appeal, this Court views the evidence and the reasonable inferences derived therefrom in a light most favorable to Defendant, who offered Instruction No. 10. ***Heidrick v. Smith***, 169 S.W.3d 180, 182 (Mo. App. 2005). The favorable evidence and inferences bearing upon Plaintiff's alleged failure to keep a careful lookout are set forth below.

Plaintiff lived in Joplin, Missouri. He and his friend, Greg Cook (Cook), often went on motorcycle rides together. On September 25, 2004, Cook called Plaintiff and asked if he wanted to attend a motorcycle ride event in town that was being conducted to benefit blind children. Plaintiff agreed to do so. Cook arrived at Plaintiff's house around 10:00 a.m. The weather was clear and sunny.

After Cook and Plaintiff had traveled about one mile from his house, they were approaching the intersection of Maiden Street and Junge Blvd. At that location, Maiden has two northbound and two southbound lanes, but there is no separate turn lane for vehicles making a left turn. Each lane on Maiden is approximately 12 feet wide. Junge has one eastbound and one westbound lane. Cook and Plaintiff were both in the outside, southbound lane on Maiden. Cook was in the lead and was riding in the left half of the outside lane. Plaintiff, who was riding in the right half of the outside lane, trailed behind Cook by approximately three to four seconds. Both motorcyclists were traveling about 30 m.p.h.

Defendant was operating a 1997 blue-green Altima that was approaching the intersection from the opposite direction. She planned to turn left onto westbound Junge. As Defendant slowed down, she could see both motorcycles. The northbound and southbound lanes of Maiden each had a solid green traffic light. Defendant's vehicle was in the inside, northbound lane of Maiden. She came to a complete stop in the middle of the intersection with her left turn signal activated and waited for oncoming traffic to go past her. Directly across from Defendant, there was a Bronco in the inside, southbound lane of Maiden. This vehicle was waiting to turn left onto the eastbound lane of Junge. As Cook and Plaintiff got close to the intersection, Defendant could no longer see them because the Bronco obstructed her vision. Defendant remained stopped as two cars went through the intersection. Cook entered the intersection and saw that Defendant was getting ready to turn left. Cook waved, held up two fingers and pointed back behind himself to let Defendant know that there was a second motorcycle coming. She did not understand what Cook was trying to tell her. After Cook's motorcycle passed by Defendant, she thought the intersection was clear and began turning left. She still could not see Plaintiff's motorcycle because of the Bronco. After Defendant was part way through her turn, the right front corner of her car collided with the front of Plaintiff's motorcycle. The collision occurred in the outside, southbound lane of Maiden. Defendant did not see Plaintiff at all until the moment of impact.

The same was true for Plaintiff. He had entered the intersection under a solid green light and had the right-of-way. The Bronco obscured Plaintiff's view of Defendant's car. In addition, there was another vehicle in the eastbound lane of Junge that was getting ready to turn right into the outside, southbound lane of Maiden. Plaintiff

was watching this vehicle to see whether it was going to pull out in front of him. He did not see Cook wave or point. Plaintiff came out of the blind spot created by the Bronco, and the collision happened right away. He saw a green flash to his left and then hit Defendant's car. Plaintiff saw Defendant's car "too late" to avoid the collision.

Some time after the collision, Defendant's attorneys hired accident reconstructionist Steve McKinzie to analyze the crash. At trial, the jury was presented with the following opinion testimony from McKinzie. At the time Defendant started her turn, neither she nor Plaintiff could see each other because of the Bronco. It took Defendant from 3.1 to 3.9 seconds to accelerate from a complete stop to the point of impact. When Plaintiff emerged from the blind spot, he was only 34-35 feet from the point of collision. Because he was traveling at 44 feet per second, he was only .75 to .8 seconds from impact when he and Defendant could first see each other. McKinzie opined that Plaintiff had insufficient time and distance to avoid the collision because it would have taken him .75 seconds to perceive the danger created by Defendant's car and another .75 seconds to react to that danger.

Plaintiff argues that Instruction No. 10 lacked evidentiary support because Defendant adduced no evidence that Plaintiff had the means and ability to avoid the collision. This Court agrees.

Every motorist must exercise the highest degree of care to keep a careful lookout ahead and laterally for dangerous situations and conditions. ***Luallen v. Reid***, 58 S.W.3d 50, 53 (Mo. App. 2001). Nevertheless, the submission of a lookout instruction is not proper unless there was substantial evidence showing that the person charged with negligence could and should have seen the danger of injury to himself in time thereafter

to have taken available and effective precautionary action. ***Young v. Grotsky***, 459 S.W.2d 306, 309-10 (Mo. 1970); ***Hill v. Barton***, 579 S.W.2d 121, 128 (Mo. App. 1979). "A failure to keep a lookout submission contains two inherent components, the ability to see and the ability, including time and means, to avoid the accident." ***Kearbey v. Wichita Southeast Kansas***, 240 S.W.3d 175, 182 (Mo. App. 2007); *see* ***Brown v. Wallace***, 52 S.W.3d 21, 23 (Mo. App. 2001). Thus, evidence that Plaintiff had sufficient time and distance to avoid the collision, considering the movements and speeds of the vehicles, was necessary to support the giving of Instruction No. 10. *See* ***Thurman v. Anderson***, 693 S.W.2d 806, 807 (Mo. banc 1985).

As Defendant approached the intersection, she remained in her own lane of traffic. Therefore, Plaintiff was under no obligation to take any evasive action at that time. *See, e.g.*, ***Hecker v. Schwartz***, 426 S.W.2d 22, 26-27 (Mo. 1968) (holding that a motorist is under no duty to swerve or take other evasive action until he knows or should know that an oncoming driver is likely to invade the wrong side of the roadway); ***Hollis v. Blevins***, 927 S.W.2d 558, 565 (Mo. App. 1996) (same holding). When Defendant entered the intersection, she remained in her own lane and came to a complete stop. Once again, Plaintiff was under no obligation to take any evasive action at that time because Defendant's stopped vehicle posed no danger to Plaintiff. *See* ***Powell v. Watson***, 526 S.W.2d 318, 325 (Mo. App. 1975) (holding that a stopped vehicle, which must yield the right-of-way to oncoming traffic, poses no danger until it moves from its stopped position and is likely to proceed into the path of an approaching vehicle). It was only after Defendant began her left turn, and thereby entered the opposing southbound lanes of traffic, that her vehicle created a danger of injury to Plaintiff. *See* ***Mozelewski v.***

Shannon, 774 S.W.2d 849, 852-53 (Mo. App. 1989). Because the Bronco obscured Plaintiff's vision, however, there was no way for him to see Defendant's vehicle when it first began to move. Even exercising the highest degree of care, Plaintiff was unable to see that Defendant had begun her left turn until her car was only 34-35 feet away from Plaintiff's motorcycle. At that point, Plaintiff was moving toward the point of impact at 44 feet per second. Allowing 1.5 seconds for both perception and reaction time, Plaintiff did not have the time and means to avoid the collision once he emerged from the blind spot created by the Bronco. Accordingly, the evidence was insufficient to support the giving of Instruction No. 10. *See* ***Powell***, 526 S.W.2d at 325-26. Because this instruction was the only one which permitted the jury to assess a percentage of fault to Plaintiff, the error was prejudicial. *See* ***McLeod v. Beloate***, 891 S.W.2d 476, 478 (Mo. App. 1994). Point I is granted.

Point II

In Point II, Plaintiff challenges the trial court's decision not to award prejudgment interest pursuant to § 408.040. The following facts are relevant to the disposition of this point. On December 21, 2004, Plaintiff sent an offer of settlement by certified mail to Defendant's attorney. Counsel received the letter on December 22, 2004. In relevant part, the settlement offer from Plaintiff's counsel stated:

> I have been authorized by my client, Ronald Hayes, to settle his claim against your clients by the delivery of copies of the titles to all vehicles owned or driven by, or available for the use of Patrick, Gaylia, or Trisha Price on September 25, 2004, certified copies of all indemnity agreements in any form from any source whatsoever, all applicable liability insurance coverages, including declaration pages, primary, excess, or otherwise, issued on those vehicles, or to or for the benefit of, or on behalf of Patrick, Gaylia, or Trisha Price, or any other named insured, which insure or stand to indemnify any of them for any of their potential liability arising in any fashion from the collision in this matter and to compensate the damages

> claimed by Ronald Hayes, a sworn statement of Patrick, Gaylia, and Trisha Price taken in person by [the Plaintiff's attorney] at [his] cost, and recorded and transcribed by a court reporter, in addition to the payment of $325,000.00, and reimbursement of all court costs, payable in cash or its equivalent, and all of which must be delivered to [the plaintiff's attorney's] office within 10 days of acceptance, in exchange for a R.S.Mo. § 537.060 release ….
>
> Acceptance of this offer may be made only in writing expressly agreeing to the terms in this letter and release, and requires the actual delivery of the above items and statements, and the full payment of the above demanded amount ….

The offer was not accepted. After the verdict in Plaintiff's favor was returned, he filed a motion requesting prejudgment interest. Defendant opposed the request because Plaintiff's settlement offer demanded the participation and cooperation of Patrick and Gaylia Price, who were not parties to the action, in order to reach a settlement. Defendant argued that Plaintiff's insistence on demanding performance by these nonparties rendered any resulting contract unenforceable. The trial court agreed and denied Plaintiff's request for prejudgment interest.

The interpretation and application of § 408.040.2 presents a question of law which this Court reviews *de novo* without deference to the trial court's decision. ***Smith v. Shaw***, 159 S.W.3d 830, 833 (Mo. banc 2005); ***McKinney v. State Farm Mut. Ins.***, 123 S.W.3d 242, 245 (Mo. App. 2003). In relevant part, the pertinent version of the statute states:

> In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date of sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. Nothing

> contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.

§ 408.040.2.[2] Plaintiff contends that the trial court erred by denying the request for prejudgment interest because his offer of settlement met all of the explicit requirements of this statute. Plaintiff argues that the additional documents and information he requested did not violate any provision of the statute or frustrate its intended purpose. This Court disagrees.

Contract principles are utilized to determine whether a settlement offer meets the requirements of § 408.040.2. ***Brown v. Donham***, 900 S.W.2d 630, 633 (Mo. banc 1995); ***Boehm v. Reed***, 14 S.W.3d 149, 151 (Mo. App. 2000). "The purpose of § 408.040.2 is to encourage settlement. Settlement can only occur by the unequivocal acceptance of a definite offer or demand, resulting in an enforceable contract." ***Brown***, 900 S.W.2d at 634. In the case at bar, Plaintiff offered to settle for the sum certain of $325,000. Defendant, however, could not buy her peace by simply paying this sum to Plaintiff. Instead, Defendant would have been obligated to deliver the following documents within 10 days after acceptance of Plaintiff's offer:

1. copies of the titles to all vehicles owned or driven by, or available for the use of Patrick, Gaylia, or Trisha Price on the day of the collision;

2. "certified copies of all indemnity agreements in any form from any source whatsoever, all applicable liability insurance coverages, including declaration pages, primary, excess, or otherwise, issued on those vehicles, or to or for the benefit of, or on behalf of Patrick, Gaylia, or Trisha Price, or any other named insured, which insure or stand to indemnify any of them for any of their potential liability

[2] This statute was repealed and reenacted with significant amendments in 2005. *See* H.B. No. 393, 2005 Mo. Laws 643-44. These amendments took effect on August 28, 2005. ***Id***. at vii. Plaintiff's lawsuit was filed in January 2005. Therefore, the version of the statute in effect at that time is the one that applies here. *See* § 1.170.

arising in any fashion from the collision in this matter and to compensate the damages claimed by Ronald Hayes"; and

3. sworn statements from Patrick, Gaylia, and Trisha Price taken in person by the Plaintiff's attorney.

Patrick and Gaylia Price were not parties to the lawsuit brought by Plaintiff against Defendant. Nothing in Plaintiff's settlement letter set forth any basis for asserting a claim against these individuals. Nevertheless, Defendant could not accept Plaintiff's settlement offer without the cooperation and participation of Patrick and Gaylia Price.[3] For example, they would have been required to provide copies of the titles to any vehicles that were owned by, driven by or available for their use. They would have been required to provide certified copies of any indemnity agreements or insurance policies issued to them or that insured their vehicles. They would have been required to submit to sworn statements by Plaintiff's counsel. There is nothing in the record before this Court indicating that Patrick and Gaylia Price provided any of the requested information or documents or would have consented to do so if a settlement had been reached. "[I]f the fulfillment of the contract depends on the act or consent of a third party, the contract is unenforceable until the third party so acts or consents." ***Werner v. Ashcraft Bloomquist, Inc.***, 10 S.W.3d 575, 578 (Mo. App. 2000); ***Cosky v. Vandalia Bus Lines, Inc.***, 970 S.W.2d 861, 866 (Mo. App. 1998). Because Plaintiff's settlement offer would not have resulted in an enforceable contract even if it had been accepted by Defendant, the offer

[3] Given the broad nature of the documentation requested by Plaintiff, the cooperation and participation of other individuals also might have been a prerequisite to settlement. For example, if a vehicle not owned by Patrick Price was available for his use, Defendant would have been required to secure a copy of the title to that vehicle and a certified copy of any policy insuring it.

did not comply with the requirements of § 408.040.2. ***Brown***, 900 S.W.2d at 634.[4] Consequently, the trial court did not err in denying Plaintiff's request for prejudgment interest. Point II is denied.

Disposition

As noted above, the trial court did not err in denying Plaintiff's request for prejudgment interest. The court did err, however, in giving Instruction No. 10. No remand is required in order to correct this error. ***Spann ex rel. Spann v. Jackson***, 84 S.W.3d 478, 482 (Mo. App. 2002); ***Dick v. Carbon***, 926 S.W.2d 172, 173 (Mo. App. 1996). Rule 84.14 authorizes this Court to modify the judgment by eliminating the reduction in damages due to erroneous assessment of comparative fault to Plaintiff. ***Robinson v. Weinstein***, 856 S.W.2d 337, 338 (Mo. App. 1993). Disregarding any fault on Plaintiff's part, the jury assessed his total damages at $625,000. The judgment is modified by adjusting the amount due Plaintiff from $500,000 to $625,000. ***Id***. As modified, the judgment is affirmed.

Jeffrey W. Bates, Judge

BARNEY, J. – Concurs

LYNCH, C.J. – Concurs

[4] It is permissible for a plaintiff to make an offer to settle for a defendant's policy limits without knowing what that sum is when the offer is made. *See, e.g.*, ***Johnson v. Allstate Ins. Co.***, 262 S.W.3d 655, 664 (Mo. App. 2008). Here, however, Plaintiff offered to settle for the discrete sum of $325,000. Therefore, verification of Defendant's insurance limits would not have been necessary to ascertain the amount of the settlement offer. Under these circumstances, it is not apparent what purpose was served by Plaintiff's insistence that Defendant and other persons give sworn statements and provide copies of their car titles, insurance polices, etc.

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Respondent's Attorney: John L. Mullen of Kansas City, MO

Division II